



Date: September 5, 2012

To: Legislation and Governmental Organization Committee

From: Ezra Rapport  
Executive Director

Subject: **CEQA Guidelines Analysis**

Recent studies have made the point, including those conducted by the Bay Area Air Quality Management District (BAAQMD), that future development in areas proximate to freeways or busy arterials should consider the health impact of ambient freeway particulate matter on future residents of the project. The issue before local governments is whether or not these findings are required to be integrated into the CEQA process, or whether such findings constitute a land use policy matter that local governments can manage through conditions of approval.

Presently, there is a lack of clarity on whether the study of the impact of freeway ambient air quality is a CEQA matter or a local government policy matter. This lack of clarity has a serious impact on the ability of local governments to manage the entitlement process within PDAs and attract private and public investment to these areas. ABAG, as one of the key sponsors of the PDA strategy, has an obligation, in my opinion, to assist its members in understanding the type and level of analysis that is required by CEQA with respect to PDAs.

Recently published appellate court cases have examined the underlying CEQA statute regarding the principle of whether CEQA requires an examination of how the existing, ambient environment impacts the project or its users. In each case, the court ruled it did not. The CEQA statute contains provisions to study how the impact of the proposed project on the environment needs to be studied, not the reverse.

In the 2012 appellate case, *Ballona Wetlands Trust*, the Court struck Appendix G, the Environmental Checklist form, which contains the guideline requiring the examination of the existing environment on the project and its users. The Court did not address the guidelines directly. However, given the holding of the opinion, and the striking of Appendix G, it is logical that the Court intended that the offending guideline be struck by

the Department of Natural Resources. The Supreme Court declined to hear the case, leaving the opinion intact.

To help resolve this matter, the Executive Director would like to approach State government (Governor's Office, Attorney General's Office, Office of Planning and Research, Department of Natural Resources) to seek clarification regarding its published CEQA guidelines. The plan to do so includes obtaining a legal opinion from a strategically chosen law firm with known access to the Governor's Office, as well as contacts among other stakeholders with an interest in clarifying the intent of this guideline.

Attached is a proposal from Wendell Rosen, authored by attorney Zach Wasserman, to provide ABAG with such an opinion within the Executive Director's contracting authority (proposal is for a fixed fee of \$15,000), to be funded by the Planning Budget. If the opinion is useful in providing clarity for the state of CEQA law for this purpose, the Executive Director will request meetings with appropriate State agencies and report back to the L&GO Committee. It is expected that this process could take as long as 12 months.

### **Recommendation**

Staff recommends the Committee approve the process to achieve clarification of this CEQA guideline. Mr. Wasserman will be available to answer any questions.

Attachment:  
Wendell Rosen proposal dated August 16, 2012